No. 934.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *Petitioner*,

v.

UEBERSEE FINANZ-KORPORATION, A. G.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT.

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BART W. BUTLER,
Attorneys for Respondent.

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Of Counsel.

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SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT.[1]

At the time of argument petitioner filed a supplemental memorandum in which it is attempted to meet the challenge embodied in respondent's brief, reading as follows (p. 20):

> Since petitioner's attorneys rely almost entirely upon the sale and disposition language of amended § 5(b) to support their whole position, it seems nothing short of amazing that nowhere in their brief have they even undertaken to break down or even to criticize the reconciliation between the provisions of § 9(a) and the dispositive provisions of § 12 given in *Central Union*

[1] Submitted pursuant to permission of the Chief Justice communicated through the Clerk of the Court.

Trust v. *Garvan, supra*, 254 U. S. 554, 569, which presents a precise analogy to the reconciliation of § 9(a) with the dispositive provisions of amended 5(b).

At page 2 of their memorandum petitioner's attorneys state:

> The assumption that Section 12 conferred powers whose exercise would have been inconsistent during World War I with the obligation to return nonenemy property is erroneous. Section 12 was addressed to enemy (and ally-of-enemy) property only.

The burden of their entire memorandum is embodied in the latter sentence. The argument offered in support of this proposition is utterly empty. It is established beyond doubt by the decided cases that the dominion or dispositive provisions of § 12 are as applicable to non-enemy property seized under § 7(c) as to enemy property seized under that section, and that up until suit is brought under § 9(a) the Custodian may deal with non-enemy property in exactly the same fashion as with enemy property, even to the extent of conveying good title to a purchaser at an alleged inadequate price.

In the case of *Sielcken-Schwarz* v. *American Factors*, 60 F. 2d 43, cert. den., 287 U. S. 654, an argument identical to that submitted by petitioner was urged by the plaintiff therein and the Second Circuit Court of Appeals, in an interesting analysis, rejected the argument and, among other things, stated (p. 45):

> Section 12, as amended by Act March 28, 1918, §1 (50 USCA, Appendix §12)—before the custodian attempted to vote on the shares—not only gave him the powers of "a commonlaw trustee", which alone would have been enough, but explicitly provided that he should "in addition thereto, * * * have power to manage such property and do any act or things in respect thereof or make any disposition thereof * * * by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto * * * in like manner as though

he were the absolute owner". *There is not the slightest reason to suppose that this was intended to apply only to property which was in fact enemy held*, and it would have been impossible to execute the purposes of the act if it had been. The custodian, having determined that the property was subject to the Act, might never discover his mistake; the owner might not apply to any court, might apparently acquiesce in his decision. The property must meanwhile be protected; good occasions not be let slip; all sorts of action might be essential in the very interest of the owner. (italics supplied)

Exactly the same reasoning was implicit in the opinion of Judge Holmes in *Central Union Trust Co.* v. *Garvan, supra*, 254 U. S. 554, 569.

At page 3, petitioner repeats a theme running through its main brief and reading as follows:

> As the Act then stood, the Custodian's powers under Section 7(c) were limited to the property of enemies or allies of enemies.

We feel that we have demonstrated the utter erroneousness of this statement in our main brief (pp. 14-20) and at the argument. It is beyond question that the seizure powers given to the Custodian under §7(c) covered both enemy and non-enemy property and that, providing he made an investigation and determination that the demanded property was owned by or held for the benefit of an enemy, the seizure was valid in every particular even though his determination might be erroneous. And it is submitted that virtually no seizure made under §7(c) could be an erroneous seizure. Pursuant to the Executive Order of February 16, 1918 and the rules thereunder, the Custodian prescribed a form of demand which embodied an express finding that the property belong to or was held for the benefit of an enemy or ally of enemy. (See Exhibit A attached) The only possibility of an erroneous seizure would be in the case where the Custodian spelled out facts in his demand which would

show on their face that as a matter of law the demanded property could not be enemy property.

Therefore, the dominion or dispositive provisions of §12 were clearly as applicable to enemy property as to non-enemy property. This being so, there is not one whit more problem involved in reconciling the dispositive provisions of § 5(b) with 9(a) than there is of reconciling the dispositive provisions of § 12 with 9(a).

In addition to the inequitable and impractical results flowing from petitioner's attempted interpretation of the retention powers of the Custodian under amended 5(b), which we have heretofore demonstrated, there is this added observation which is of major importance. By giving effect to the alternative remedies of § 9(a) (return of property in kind or proceeds), the Government can suffer no loss. On petitioner's hypothesis, however, there are heavy potentialities of loss to the American taxpayer. In those instances where the seized property has substantially depreciated in value while in the hands of the Custodian and is sold for less than the value at the time of seizure, the claimant would be entitled to a judgment in the Court of Claims for the value at seizure. The difference, on petitioner's own hypothesis, would have to be made up out of the Treasury of the United States.

Respectfully submitted,

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EXHIBIT "A"

A.P.C. Form No. 106 File No. .....

ALIEN PROPERTY CUSTODIAN

Demand by Alien Property Custodian for Property

Extracts from "Trading with the enemy Act."

Sec. 7(c). (Here on the form are printed the seizure powers embodied in Section 7(c).)

Sec. 7(e). (At this point are printed the exculpatory provisions of Section 7(e).)

To.....

Address.....

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act," approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act, and said executive orders, after investigation do determine that the following money and other property, to wit:

.....

.....

is by you owing and belonging to and held for, by, on account of, and on behalf of, and for the benefit of.....

.....

Address.....

whom after investigation I do determine to be an (enemy) (ally of enemy) not holding a license granted by the President, and I hereby require that the said money and property shall be by you conveyed, transferred, assigned, delivered, and paid over to me as Alien Property Custodian to be by me held, administered, and accounted for as provided by law.

(Witness my hand and seal of office, this ..... day of .....191.....

.....

Alien Property Custodian

Report No. .....

Trust No. .....

(Strike out the inapplicable clauses.)

[This form taken from A.P.C. Form No. 116, Bulletin of Information issued by Alien Property Custodian, June 8, 1918, Washington Government Printing Office 1918, pp. 18-19.]